

**NO. 14-18-00760-CR**

**IN THE COURT OF APPEALS  
FOR THE FOURTEENTH SUPREME JUDICIAL DISTRICT  
OF TEXAS AT HOUSTON**

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**RAUL BAHENA**

**APPELLANT**

**VS.**

**THE STATE OF TEXAS**

**APPELLEE**

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**APPELLANT'S BRIEF**

**ORAL ARGUMENT REQUESTED**

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## **LIST OF PARTIES**

The Appellant is Raul Bahena.

The Appellant's trial counsel is Patricia Segura.

The Appellant's appellate counsel is Crespín Michael Linton.

The Trial Judge is The Honorable Leslie Brock Yates.

The appellate attorney representing the State is Daniel McCrory, Assistant District Attorney, Harris County, Texas.

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## **PRELIMINARY STATEMENT**

On August 23, 2018, a jury found Appellant, Raul Bahena, (Bahena) guilty of Aggravated Robbery with a Deadly Weapon. On the same day, the trial court assessed a sentence of 25 years in the Texas Department of Criminal Justice. Appellant Bahena perfected his appeal on August 23, 2018. (TR. Vol. 1 at 119)

## **STATEMENT OF FACTS**

### **TRIAL PHASE**

#### **A. State's Witnesses**

##### **1. Monica Soria**

Monica Soria testified that in May of 2017 she was a student at Cypress Wood High School and worked the evening shift as an assistant manager at a Subway sandwich shop in Cypress, Texas. (R.R. Vol. 3 at 8-9) Soria stated that at about 10:30 p.m. on May 19, 2017 her friend Dominique Morales picked her up from the Subway shop and drove them to a nearby park where they listened to music before her 11:00 p.m. curfew. (R.R. Vol. 3 at 10-12) She commented that she felt safe at the park because it was across the street from her home. (R.R.



Vol. 3 at 15) Soria explained that as she and Morales were sitting in his parked car at the park that Appellant approached the driver's side window, asked for a cigarette, and walked away when Morales said he had none. (R.R. Vol. 3 at 16-18) She stated that she recognized Appellant from middle school but noted that Appellant did not seem to recognize her in the car. (R.R. Vol. 3 at 17)

Soria testified that Appellant returned about 30 second later, stood at the driver's side window, pointed a handgun at them, and stated the following: "This is a stick-up. Give me everything you have." (R.R. Vol. 3 at 22-23) She explained that she did not believe Appellant's gun was loaded because he cocked the gun twice without the gun ejecting a bullet. (R.R. Vol. 3 at 25-26) Soria stated that Appellant and Morales fought with each other when Morales tried to start the car and Appellant reached in to stop him. (R.R. Vol. 3 at 26) She testified that Morales gave Appellant his Chicago Bulls hat and she gave him her backpack which contained a wallet, debit card, a gift certificate from her Economics teacher, and her school identification card. (R.R. Vol. 26-27) Soria stated that the driver's side mirror on Morales' car broke as he drove over a curb to flee from the park. (R.R. Vol. 3 at 28-32)

She testified that she did not contact the police that evening because she was scared that her mother would be mad at her for returning home after her 11:00 p.m. curfew even though her mother was asleep when she returned. (R.R. Vol. 3 at 34) Soria explained that the following day she met with a police officer at her home, gave him a statement, and identified Appellant as the robber in a photo array shown to her by the police officer. (R.R. Vol. 3 at 35-37) She testified that the police returned to her the Subway hat, gift certificate, and school identification card, but she never received the Subway store key, backpack, and Debit card. (R.R. Vol. 3 at 37) Soria stated that Appellant scared her. (R.R. Vol. 3 at 37)

On cross-examination, Soria admitted that she failed to mention the fight between Appellant and Morales in her statement. (R.R. Vol. 3 at 38) She conceded that the parking lot area where the robbery allegedly occurred was very dark because Morales did not park his car near any of the lampposts. (R.R. Vol. 3 at 41) Soria admitted that she did not personally know Appellant but explained that she was friends with Appellant's cousin named Jessica. (R.R. Vol. 3 at 41) She claimed that she feared her mother would mad at her even though she missed her curfew by only 5 minutes. (R.R. Vol. 3 at 42) Soria denied that she

and Morales were drinking alcohol or smoking marijuana at the park. (R.R. Vol. 3 at 43) She admitted that some of her stolen belongings were later recovered from Appellant's brother named Victor Bahena. (R.R. Vol. 3 at 44) Soria denied that Victor Bahena robbed her and Morales when she was shown his picture. (R.R. Vol. 3 at 45)

## **2. Eusevio Del Toro**

Harris County Constable Precinct 4 Deputy Del Toro testified that on May 20, 2017, he took a written statement from Soria and showed her a photo array which contained Appellant's photograph. (R.R. Vol. 3 at 46-50) Del Toro stated than Soria positively identified Appellant in photograph number 3 as the robber. (R.R. Vol. 3 at 52) On cross-examination, he stated he assisted officers in recovering Soria's property. (R.R. Vol. 3 at 53)

## **3. Johnny Whiteley**

Harris County Constable Precinct 4 Sergeant Johnny Whiteley testified that on May 20, 2017 he was dispatched for a family disturbance call to the Bahena home in Cypress, Texas. (R.R. Vol. 3 at 55-57) Whiteley stated that he was familiar with the brothers Raul and Victor Bahena. (R.R. Vol. 3 at 58) He explained that the Bahena home is located near the park where Soria and Morales were robbed. (R.R.

Vol. 3 at 63) Whiteley testified that he arrested Victor Bahena after a short foot chase. (R.R. Vol. 3 at 66) He stated that Deputy Sanchez transported Victor Bahena to the Harris County Jail. (R.R. Vol. 3 at 68)

Whitely testified that he was again dispatched to the Bahena home about an hour later for another family disturbance involving Appellant. (R.R. Vol. 3 at 68) He explained that officers established a perimeter around the house and brought a K-9 unit to assist in locating Appellant. (R.R. Vol. 69-70) Whiteley testified that the police dog found Appellant hiding in a neighbor's backyard. (R.R. Vol. 3 at 72) He stated that Appellant was treated for dog bites to his arm. (R.R. Vol. 3 at 74)

On cross-examination, Whiteley admitted that Deputy Sanchez found Soria's debit card on Victor Bahena. (R.R. Vol. 3 at 75) He conceded that he did not find any of Soria's property on Appellant when he arrested him. (R.R. Vol. 3 at 77) Whiteley commented that he did not realize that Appellant was a suspect in Soria's robbery at the time he arrested Appellant. (R.R. Vol. 3 at 78)

#### **4. Isidrio Sanchez**

Harris County Constable Precinct 4 Deputy Isidrio Sanchez testified that about 7:00 a.m. on May 20, 2017 he assisted Deputy Whiteley in searching for Victor and Raul Bahena. (R.R. Vol. 3 at 79-81)

Sanchez stated that he met and spoke with the Bahena brothers' cousin named Jessica Bahena. (R.R. Vol. 3 at 81) He explained that the officer chased and caught Victor Bahena as he fled from a neighbor's backyard. (R.R. Vol. 3 at 82) Sanchez testified that he found Soria's debit card and another person's credit card in Victor Bahena's jacket which he was wearing. (R.R. Vol. 3 at 83-84) He stated that he did not see Appellant that day. (R.R. Vol. 3 at 85) Sanchez testified that he found marijuana on Victor Bahena and took him to jail. (R.R. Vol. 3 at 86)

## **5. Melinda Wilson**

Cypress Fairbanks Independent School District Officer Melinda Wilson testified that on May 20, 2017 she met with a Cypress homeowner who called the school district concerning school property found in the homeowner's backyard. (R.R. Vol. 4 at 5-7) Wilson explained that in the homeowner's backyard she found a backpack, Soria's Cypress Wood High School identification card, Soria's paper Texas Driver's License, Subway sandwich shop apron and ball cap with Soria's nametag, Soria's achievement certificate, and perfume scattered across the backyard. (R.R. Vol. 4 at 7-9) She stated that this home was located near the park where Soria was robbed. (R.R. Vol. 4 at 10)

## **6. Larry Franks**

Harris County Sheriff's Department Deputy Larry Franks testified that all inmate calls made from the Harris County Jail are recorded and saved for future use. (R.R. Vol. 4 at 13-18) Franks explained that the telephone calls are stored according at each inmate's specifically assigned number (SPN number) which the inmate enters along with his PIN number into the phone before any call can be made. (R.R. Vol. 4 at 18) He stated that he recorded a disc of telephone calls made by Appellant from the jail. (R.R. Vol. 4 at 21-23) Franks admitted that the telephone call recordings are maintained on the computer server of a private company named Securus. (R.R. Vol. 4 at 24) The trial court overruled Appellant's hearsay objection that Securus and not Harris County is the custodian of these records. (R.R. Vol. 4 at 25) Franks played telephone calls from the jail made by Appellant on May 25, 2017, September 6, 2017, September 20, 2017, November 23, 2017, December 31, 2017, January 11, 2018, and May 1, 2018 in which Appellant discussed the robbery and discussed paying Soria for signing an Affidavit of Non-Prosecution. (R.R. Vol. 4 at 25-26)

On cross-examination, Franks admitted that the Harris County Jail houses between 9,000 to 10,000 inmates on a daily basis. (R.R. Vol. 4

at 27) He explained that an inmate must input his SPN number and a PIN number which consists of the month and year of his birth to make a telephone call. (R.R. Vol. 4 at 27) Franks admitted that inmates rent their SPN numbers and PIN numbers so other inmates can make telephone calls. (R.R. Vol. 4 at 28) He conceded that an inmate can place a telephone call if he knows another inmate's SPN number and PIN number. (R.R. Vol. 4 at 28)

## **7. Mike Mauldin**

Harris County Sheriff's Department Investigator Mike Mauldin testified that he tried to locate a subpoenaed witness named Jessica Bahena but was unable to find her. (R.R. Vol. 5 at 5) Mauldin explained that the trial court signed a writ of attachment which authorized him to take her into custody if he had found her. (R.R. Vol. 5 at 6)

On cross-examination, he admitted that Jessica Bahena's mother contacted him to state that Jessica Bahena had left home for court yesterday, but Mauldin did not know if she appeared in court. (R.R. Vol. 5 at 7) He claimed that he tried calling Jessica Bahena several times, but she never answered and eventually blocked his telephone number from calling her. (R.R. Vol. 5 at 8) Mauldin conceded that the subpoena

required her to report to the Harris County Civil Courthouse although the jury trial was being held in a different building. (R.R. Vol. 5 at 9)

The State rested. (R.R. Vol. 5 at 9)

**B. Defense's Witness**

**1. Edaena Fernandez**

Harris County District Court clerk Edaena Fernandez testified that the district court records show that Victor Bahena was incarcerated in the Harris County Jail from May 20, 2017 until December 13, 2017 for the felony charge of Debit Card Abuse for the possession of Soria's debit card. (R.R. Vol. 5 at 10-11) On cross-examination, Fernandez noted that the Victor Bahena's felony charge was dismissed. (R.R. Vol. 5 at 11) She conceded that he was not in custody on this charge on May 1, 2018 when Appellant allegedly made a telephone call from jail. (R.R. Vol. 5 at 11) Fernandez admitted that she did not know if Victor Bahena was in jail on May 1, 2018 for another charge. (R.R. Vol. 5 at 11)

The Defense rested. (R.R. Vol. 5 at 12)



The trial court overruled Appellant's request for the lesser-included charge of Robbery although Soria claimed that she did know if the gun was real. (R.R. Vol. 5 at 12)

### **C. Jury's Verdict**

The jury found Appellant guilty of Aggravated Robbery with a Deadly Weapon. (R.R. Vol. 5 at 21)

## **PUNISHMENT PHASE**

Appellant pleaded "True" to the enhancement allegation that on May 13, 2016, he was convicted of Burglary of a Habitation in the 185<sup>th</sup> District Court of Harris County, Texas. (R.R. Vol. 5 at 22)

### **A. State's Witnesses**

#### **1. Gustavo Burgos**

Gustavo Burgos testified he worked with Appellant at Doria's restaurant in Cypress, Texas. (R.R. Vol. 5 at 23) Burgos explained that in April of 2017 that his apartment was burglarized, and his jewelry, television, New York Identification Card, and Permanent Resident Card were stolen. (R.R. Vol. 5 at 24-26) He claimed that the burglary made

him scared and nervous. (R.R. Vol. 5 at 26) On cross-examination, he admitted that the television, jewelry, and identification cards were returned to him. (R.R. Vol. 5 at 26)

## **2. Javier Ramos**

Cypress-Fairbanks Independent School District Officer Javier Ramos testified that in April of 2017 he was dispatched to the Bahena home to transport Appellant and another person to jail. (R.R. Vol. 5 at 28) Ramos explained that he searched Appellant's pockets and found Burgos' New York Identification Card. (R.R. Vol. 5 at 29) He testified that Appellant was on bond for the felony Burglary of a Habitation charge when he was arrested for Aggravated Robbery of Soria. (R.R. Vol. 5 at 30)

## **3. Jason Zitmann**

Harris County Constable Precinct 4 Corporal Jason Zitmann testified that on April 17, 2017 he stopped a white 4-door Nissan Sentra driven by Appellant along with a passenger. (R.R. Vol. 5 at 30-32) Zitmann explained that he stopped the vehicle because of a large television that was sticking out of the right rear window. (R.R. Vol. 5 at 32) He testified that he searched the vehicle after smelling marijuana

and found a television, a bag of women's jewelry, a Permanent Resident Card, and a checkbook in the name of Flora Burgos. (R.R. Vol. 5 at 33-34)

The State rested. (R.R. Vol. 5 at 36)

The Defense rested. (R.R. Vol. 5 at 36)

**B. Jury's Sentence**

The trial court assessed a sentence of 25 years in the Texas Department of Criminal Justice. (R.R. Vol. 5 at 38)

## **POINTS OF ERROR**

### **POINT OF ERROR ONE:**

The evidence was insufficient to support Appellant's conviction for Aggravated Robbery.

### **POINT OF ERROR TWO:**

The trial court erred by denying Appellant's Requested Lesser Included Jury Instruction on Robbery.

### **POINT OF ERROR THREE:**

The trial court erred by allowing testimony of Deputy Larry Franks.

## POINT OF ERROR NO. 1

### THE EVIDENCE WAS INSUFFICIENT TO SUPPORT APPELLANT'S CONVICTION FOR AGGRAVATED ROBBERY

Appellant contends that the State has not proven its case beyond a reasonable doubt because the State has failed to show beyond a reasonable doubt that Bahena robbed Soria with a firearm.

The test for reviewing the insufficiency of the evidence where a defendant has been found guilty is for the reviewing court to determine whether, after viewing the relevant evidence in the light most favorable to the verdict, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. **Brooks v. State**, 323 S.W.3d 893 (Tex. Crim. App. 2010) Thus, the issue on appeal is not whether the appellate court believes the State's evidence but instead believes the appellant's evidence outweighs the State's evidence.

**Wicker v. State**, 667 S.W. 2d 137, 143 (Tex. Crim. App. 1984) The verdict may not be overturned unless it is irrational or unsupported by proof beyond a reasonable doubt. **Matson v. State**, 819 S.W. 2d 839,

846 (Tex. Crim. App. 1991) The jury, as the sole judge of the facts, is entitled to resolve any conflicts in the evidence, to evaluate the credibility of witnesses, and to determine the weight to be given any particular evidence. **Jones v. State**, 944 S.W. 2d 642, 647 (Tex. Crim. App. 1996)

Section 29.03(a)(2) of the **Texas Penal Code** provides that a person commits the offense of Aggravated Robbery if he commits Robbery and uses or exhibits a deadly weapon. (West 2018) A person commits Robbery if, in the course of committing theft and with intent to obtain or maintain control of the property, he intentionally or knowingly threatens or places another in fear of imminent bodily injury or death. **Tex. Penal Code**, Section 29.02(a)(2) (West 2018)

The only evidence which shows that Appellant robbed Soria by using or exhibiting a firearm was the testimony of Soria.

Appellant contends that the following listed evidence so overwhelmingly outweighs the evidence which shows that he robbed Soria with a firearm that the jury's verdict is unsupported by proof beyond a reasonable doubt.

- 1) Soria failed to report robbery to the police.
- 2) Soria's property was not found on Appellant.

3) Jail calls could have been made by Victor Bahena.

**1. Soria failed to report robbery to the police.**

Soria admitted that she and Morales did not report the robbery to the police. (R.R. Vol. 3 at 42) She claimed that she failed to mention the robbery to her mother because she was scared of her mother's punishment for breaking the curfew by even 5 minutes. (R.R. Vol. 3 at 42) Soria denied that the reason she never reported the robbery was because she and Morales were drinking alcohol and smoking marijuana at the park. (R.R. Vol. 3 at 43)

**2. Soria's property was not found on Appellant.**

Whiteley testified that he did not find any of Soria's property on Appellant when he arrested Appellant the morning after Soria was allegedly robbed. (R.R. Vol. 3 at 77) Sanchez testified that he found Soria's VISA debit card on Victor Bahena when Sanchez arrested him around 7:00 a.m. on the morning following Soria's robbery. (R.R. Vol. 3 at 83)

**3. Jail calls could have been made by Victor Bahena.**

Fernandez testified that both Appellant and his brother Victor Bahena were in the Harris County Jail from May 20, 2017 through the

end of the year. (R.R. Vol. 5 at 10-11) Franks testified that any inmate can make a telephone call from the Harris County Jail if the inmate knows another inmate's SPN number and PIN number. (R.R. Vol. 4 at 28)

The State failed to provide sufficient evidence to show that Appellant robbed Soria with a firearm because if she had experienced such a traumatic event then she would have notified the police after awakening her mother to describe the horror of having a gun pointed at her. Appellant contends that Soria's mother would have understood the reason her daughter was only 5 minutes past curfew when she learned that her daughter had been robbed at gunpoint. Appellant also claims that Soria fabricated this story of a robbery to hide from her mother the fact that she and Morales were engaged in drinking alcohol, smoking marijuana, and having sex in the park.

But even if Soria was robbed that night, Appellant claims that the robber was his brother Victor and not him. This claim is supported by the fact that Soria's property was found on Victor Bahena only a few hours after the robbery. This claim is additionally supported by the fact that Victor Bahena, not Appellant, was the person who made the



telephone calls from jail bragging about robbing Soria. Deputy Franks clearly stated that an inmate can make a telephone call from jail if he knows another inmate's SPN number and PIN number. Appellant contends that it is certain that Victor Bahena knew both of his brother's identification numbers.

Even when viewing the evidence in the light most favorable to the jury's verdict, a rational trier of fact would not have found the essential elements of Aggravated Robbery beyond a reasonable doubt. Therefore, the evidence is legally insufficient to sustain Appellant's conviction for Aggravated Robbery.

## POINT OF ERROR NO. 2

### THE TRIAL COURT ERRED BY DENYING APPELLANT'S REQUESTED LESSER INCLUDED JURY INSTRUCTION ON ROBBERY

Appellant Bahena requested that the trial court include a lesser included jury instruction of second-degree felony Robbery based on the fact that Appellant did not use or exhibit a deadly weapon because Soria testified that she was not familiar with guns. (R.R. Vol. 4 at 34 & Vol. 5 at 12) An offense is a lesser-included offense if it is established by proof of the same or less than all the facts required to establish the commission of the offense charged. **Tex. Code Crim. Proc.**, Art. 37.09 (1) (West 2018) In addition, an offense is a lesser-included offense if it differs from the offense charge only in respect that a less culpable mental state suffices to establish its commission. **Tex. Code Crim. Proc.**, Art. 37.09 (3) (West 2018) Before an instruction on a lesser included offense is warranted, a two prong test must be satisfied: 1) the lesser included offense must be included within the proof necessary to establish the offense charged and 2) some evidence must exist in the record that would permit a jury rationally to find that if the defendant is guilty, he is

guilty only of the lesser offense. **Campbell v. State**, 149 S.W. 3d 149, 152 (Tex. Crim. App. 2004)

First, the offense of Robbery is a lesser-included offense of Aggravated Robbery. **Penaloza v. State**, 349 S.W.3d 709 (Tex. App. – Houston [14<sup>th</sup> Dist.] 2011, pet. ref'd) Therefore, Bahena has satisfied the first prong of the test.

Concerning the second prong, “the issue is whether any evidence exists in the record that would permit a rational jury to find that the defendant is guilty only of the lesser included offense...anything more than a scintilla of evidence is sufficient to entitle a defendant to a lesser charge.” **Upchurch v. State**, 23 S.W.3d 536, 538 (Tex. App. – Houston [1<sup>st</sup> Dist.] 2000, pet. ref'd). Bahena contends that the second prong for establishing a lesser-included offense was met because there is more than a scintilla of evidence that would permit a jury rationally to find that if the Appellant is guilty, he is guilty only of the lesser-included offense of Robbery.

Appellant asserts that the evidence shows that Soria initially testified that she was not familiar with guns. (R.R. Vol. 3 at 22) But

after she testified about her ignorance of guns, Soria then testified that she knew that Appellant's gun was not loaded because he cocked it twice without a shell being discharged. (R.R. Vol. 3 at 25-26) Based on this contradictory testimony, Appellant contends that Soria believed that Appellant's gun was not even a firearm. Without proof that Appellant used or exhibited a deadly weapon, the lack of such testimony supported the inclusion of the lesser-included charge of Robbery. Bahena contends that he has satisfied both prongs of the test set out in **Campbell**. Because he has satisfied both prongs, the trial court erred in denying his requested instruction for the lesser-included felony offense of Robbery.

### **POINT OF ERROR NO. 3**

#### **THE TRIAL COURT ERRED BY ALLOWING THE TESTIMONY OF DEPUTY LARRY FRANKS**

The Appellant contends that the trial court erred by allowing Harris County Sheriff's Deputy Larry Franks to testify about recorded telephone calls made by Appellant from the Harris County Jail because the State failed to disclose Franks name on its witness list and because he was not the custodian of the jail recordings. (R.R. Vol. 4 at 15 & 25) The trial court overruled Appellant's objection and request to exclude Deputy Franks because the State failed to disclose him on its witness list and allowed a 30-minute continuance by reasoning that Appellant was not surprised by the State's attempt to admit Appellant's telephone calls from the Harris County Jail. (R.R. Vol. 4 at 16-18)

#### **FAILURE TO DISCLOSE WITNESS**

The courts review a trial court's decision to admit or exclude evidence for an abuse of discretion. **Sheffield v. State**, 189 S.W.3d 782, 793 (Tex. Crim. App. 2006) In determining abuse of discretion, courts consider whether the State acted in bad faith and whether

Appellant could reasonably anticipate that the witness would testify.

**Wood v. State**, 18 S.W. 3d 642, 649 (Tex. Crim. App. 2000) “In determining whether the State acted in bad faith, the principal area of inquiry is whether the defense shows the State intended to deceive the defendant by failing to provide the defense with a witness’s name.”

**Hamann v. State**, 428 S.W.3d 221, 228 (Tex. App. – Houston [1<sup>st</sup> Dist.] 2014, pet ref’d) “In examining whether the defense could have reasonably anticipated that the State would have called the witness, reviewing courts generally examine (1) the degree of surprise to the defendant; (2) the degree of disadvantage inherent in that surprise...(3) the degree to which the trial court was able to remedy that surprise (i.e., by granting the defense a recess, postponement, or continuance, or by ordering the State to provide the witness’s criminal history). **Hamann**, at 228.

The prosecutor admitted to the trial court that Deputy Franks had not been disclosed on its witness list and noted that Franks was testifying as the custodian of records in place of Pete Galvan who was unavailable and who had been previously disclosed to Appellant. (R.R. Vol. 4 at 15) However, the State’s Witness List filed 4 months prior to trial contained neither the name of Larry Franks nor the name of Pete

Galvan. (TR. at 44) Appellant contends that he was surprised by the testimony of his recorded telephone calls from the jail because the State's Witness List failed to disclose any witness who could testify about these telephone calls. Moreover, Appellant contends that the telephone calls caused great harm to his defense by corroborating Soria's testimony that he robbed her and Morales. Without their admission into evidence, the jury would have to have relied upon the sole testimony of the witness who never reported the robbery to the police. Therefore, the trial court erred in allowing Franks' testimony.

### **JAIL CALLS NOT PROPERLY AUTHENTICATED**

The trial court also overruled Appellant's objection to the admission of a disc of Appellant's telephone calls from the Harris County Jail through the testimony of Deputy Franks because Franks was not the custodian of records for these jail calls. (R.R. Vol. 4 at 25)

The courts review a trial court's decision to admit or exclude evidence for an abuse of discretion. **Sheffield v. State**, 189 S.W.3d 782, 793 (Tex. Crim. App. 2006) The Texas Rules of Evidence defines hearsay as a statement other than one made by the declarant while testifying at the trial or hearing, offered into evidence to prove the truth

of the matter asserted. **Tex. R. Evid. 801(d)** (West 2018) **Rule 802 of the Texas Rules of Evidence** provides that “[h]earsay is not admissible except as provided by statute or these rules or by other rules prescribed pursuant to statutory authority.” (West 2018)

**Rule 803(6) of the Texas Rules of Evidence** provides that records of a regularly conducted activity are not excluded as hearsay if a custodian or other qualified witness testifies in court or executes an affidavit that complies with Rule 902(10) of the Texas Rules of Evidence to the following: 1) the record was made at or near the time by – or from information transmitted by – someone with knowledge, 2) the record was kept in the course of a regularly conducted business activity, and 3) making the record was a regular practice of that activity, and 4) the opponent fails to demonstrate that the source of information or the method of circumstances of preparation indicate a lack of trustworthiness.

In **State v. Villegas**, 506 S.W.3d 717, 735 (Tex. App. - El Paso 2016, pet. ref’d) the court held that a disc of prison calls was properly authenticated by an affidavit executed by an affiant who had personal knowledge of how the recordings were made and that the recordings were stored in the prison’s telephone system.



In the present case, the State did not file the disc of calls with a business records affidavit signed by the custodian of the jail call recordings, but instead called Deputy Franks to testify as the custodian of records for these recordings. Deputy Franks testified that the jail calls were made on a system owned by Securus which was a company with whom Harris County contracted to operate and store these telephone calls. (R.R. Vol. 4 at 24) Franks explained that recordings of jail calls from the Harris County Jail were kept on Securus' server so that Securus kept custody of the recordings. (R.R. Vol. 4 at 24-25) He admitted that he was not the custodian of the jail call records and acknowledged that Securus was the proper custodian of these records. (R.R. Vol. 4 at 25)

Appellant contends that the jail call recordings contained on the disc prepared by Franks should have been excluded as hearsay because Franks admitted that he was not the custodian of records for these recordings. In fact, Deputy Franks admitted that Securus had custody of these telephone call recordings because that company maintained the computer server on which they were recorded. (R.R. Vol. 4 at 25) Moreover, Appellant contends that the disc of telephone calls lacked trustworthiness based on Franks' testimony that many of the

inmates rent their identification numbers to other inmates for those inmates to make telephone calls from the Harris County Jail. Because Deputy Franks was not the proper custodian of records and because the contents of the jail recordings lacked trustworthiness, Appellant contends that the trial court erred in allowing this hearsay evidence from Deputy Franks.

## **CONCLUSION**

For the reasons stated, Appellant Bahena prays the Court to reverse and acquit or in the alternative to reverse and remand this cause for a new trial.

Respectfully submitted,

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## **CERTIFICATE OF COMPLIANCE**

I hereby certify that Appellant's Brief, as calculated under Texas Appellate Rule of Appellate Procedure 9.4, contains 5,445 words as determined by the Word program used to prepare this document.

/s/ Crespin Michael Linton  
Crespin Michael Linton

## **CERTIFICATE OF SERVICE**

I do hereby certify that on this the 12<sup>th</sup> day of December 2018, a true and correct copy of the foregoing Appellant's Brief was served by E-service in compliance with Local Rule 4 of the Court of Appeals or was served in compliance with Article 9.5 of the Rules of Appellate Procedure delivered to the Assistant District Attorney of Harris County, Texas, 1201 Franklin Street, Suite 600 Houston, Texas 77002 at [mccrory\\_daniel@dao.hctx.net](mailto:mccrory_daniel@dao.hctx.net).

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